90-118

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES
OF AMERICA

TERM _____

KEITH MILTON RHINEHART,
a single person;
THE AQUARIAN FOUNDATION,
a Washington Not-for-profit corporation; and
LINDA DUNN,
a married person;

Appellants,

v.

KIRO, INC.,
a Washington Corporation;
THE CHURCH OF JESUS CHRIST OF
THE LATTER DAY SAINTS;

Respondents.

PETITION FOR A WRIT OF CERTIORARI FROM THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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QUESTIONS PRESENTED FOR REVIEW

1. The State Court violated plaintiffs' First Amendment Rights when it compelled disclosure of rank and file members of religion, when no damages for membership loss were sought, and when it dismissed the action for failure to produce the membership list.

2. The State Court violated plaintiffs' First Amendment Rights when it failed to conduct a balancing test or to require defendants to demonstrate need, or prejudice, as to rank and file membership lists and video tapes ordered in discovery, and dismissed Plaintiff's case when discovery was not produced.

3. The State Court violated individual plaintiff's rights to Due Process when it dismissed his case for failing to produce membership lists and videotapes over which he had no individual control.

PARTIES TO THE PROCEEDING

The parties of the proceedings are listed in the caption of the case herein.

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JURISDICTIONAL GROUNDS

The judgment which is sought to be reviewed was entered on June 8, 1988. It was affirmed by The Court of Appeals of The State of Washington on June 13, 1989. Modification of this decision was denied on August 9, 1989 and Review was declined by The Washington State Supreme Court on January 9, 1990. The statutory provision relied upon in conferring jurisdiction to this court to review the judgment by writ of certiorari is 28 USC 1257.

CONSTITUTIONAL PROVISIONS

The Constitution of the United States, Amendment 1.

The Constitution of the United States, Amendment 14.

STATEMENT OF THE CASE
STATEMENT OF RELEVANT FACTS

On or about February 29, 1984 KIRO television broadcast the third segment of a three part special report entitled "Cults". [DCP 253]* The broadcast contained footage showing Plaintiffs' Church in Seattle. [DCP253] The image of the Aquarian Foundation's Church was positioned between segments concerning Reverend Jim Jones and scenes of the horror of the multiple suicides, homicides, and bloated corpses covering the ground at Jonestown, Guyana. [DCP 253] The commentator, at the time of these scenes stated:

> There is a need to prevent the same disasters that occured in Jonestown from occuring again here at home. [DCP 253]

The broadcast communicated a false image of the Aquarian Foundation in a three fold way. The communication was carried through pictures, spoken words and written words, each type of which has direct communicatory meaning to the viewers. [DCP 253] The visual image of the Aquarian Foundation Church sandwiched between scenes concerning Jim Jones clearly presented the Church located in Seattle, and prominently displayed the sign that stands in front of the Church, which identifies it as the Aquarian Foundation. [DCP 253] Just prior to the showing of the Aquarian Foundation's sign, Mrs. Landis, a person claiming knowledge of cults in the Seattle area, referred to:

* DCP refers to Defendants' Clerk's Papers in The State Appeals Court. CP refers to Clerk's Papers in the State Appeals Court. RP refers to the State Trial Court Report of Proceedings.

"The threats, of people being afraid they are going to be taken away in the middle of the night.. . . The problems about suicide." Then the picture of the Aquarian Foundation is shown. [DCP 253]

The close-up of the readerboard outside the Aquarian Foundation appears on the screen for a number seconds and allows viewers to read the name and service times of the Church. [DCP 253] When the sign is initially shown, also seen is Reverend Rhinehart's name. [DCP 253]

Plaintiff - Appellants originally claimed damages for loss of members and donations; subsequently Plaintiffs withdrew this prayer for monetary damages [DCP 199, RP May 5, 1988 at 13.]

STATEMENT OF RELEVANT PROCEDURE

On May 16, 1988, Plaintiffs were ordered by the State Trial Court to produce certain items of discovery claimed by defendants to be necessary to the defense to their defamation claim. These items included two categories of documents: 1) videotapes, the most recent of which recorded a religious service and morality play occurring in 1978 [DCP 811] never shown to the public, and containing the visage of a number of members, and 2) rank and file membership lists.

Lists of present and past officers and officials were provided; Aquarian Foundation also agreed to provide numerical membership data, weekly accounting slips for donations, and annual reports. [CP 41] Reverend Rhinehart was deposed regarding the videotape [DCP 815], and it was uncontested that none of the videotapes concerned violence or violent practices.

Reverend Rhinehart had no authority to determine whether or not to produce the video tapes and the rank and file membership lists.

Reverend Rhinehart has no vote, as President of the Board of Directors, except in case of a tie. [DCP 346]

Membership lists had been ordered produced in a prior defamation case against other media defendants, ***Rhinehart v. Seattle Times***, 98 Wn. 2d 226, 654 P.2d 673 (1982) Aff'd 467 U.S. 20, 104 S. Ct. 2199, 81 L.Ed.2d 17 (1984). That case involved a defamation action in which plaintiffs has claimed loss of members and donations. Defendants has argued the need for membership list information to document damages of loss of members and donations. In the instant case at bar, however, loss of members and donations were not claimed as damages.

Video tapes were ordered produced in a prior defamation case against KIRO, where the videotapes were deemed relevant to the broadcast involving the financial, sexual morality, and general validity of Aquarian Foundation beliefs and practices. ***Rhinehart v. KIRO*** 44 W. App 707, 723 P2d.22 (1986) Rev. Den. 108 W2d. 108 Appeal dismissed 108 S Ct. S51 (1987). This case involves a specific defamatory statement

regarding Aquarian Foundation's propensity to duplicate the mass murder of Jonestown and not general issues of finances, sexual morality, or beliefs and practices.

On June 8, 1988, the case at bar was dismissed by the King County Superior Court of the State of Washington for failure to comply with discovery by failing to produce the membership lists and videotapes. This petition for writ of Certiorari results from that judgment. (See Appendix 1, attached).

CONSTITUTIONAL ISSUES TIMELY RAISED

The Constitutional issues herein were raised at the Trial Court level, upon objection to the requested discovery and opposition to the Motion To Compel Discovery. [DCP 797].

They were raised and considered by The Court of Appeals. (Appendix 1).

ARGUMENT

I. THE STATE COURT VIOLATED PLAINTIFFS' FIRST AMENDMENT RIGHTS WHEN IT COMPELLED DISCLOSURE OF RANK AND FILE MEMBERS OF RELIGION, WHEN NO DAMAGES FOR MEMBERSHIP LOSS WERE SOUGHT, AND WHEN IT DISMISSED THE ACTION FOR FAILURE TO PRODUCE THE MEMBERSHIP LIST.

Freedom of Association is a right derived through the First Amendment of the United States Constitution; rights of speech, press, assembly, and petition. The Supreme Court has consistently protected the right to associate with others in order to pursue constitutionally protected goals, such as religious worship.

In this case the Plaintiffs were forced to choose between the privacy of their rank and file members, and the need to defend the religious organization against vicious, defamatory media attacks. Disclosure of membership lists and videotapes would subject members of the Aquarian Foundation Church to possible harassment and threats which would produce a chilling effect on their freedom of Association. In ***Brown v. Socialist Workers*** 74 LEd 2d 252, [1982] the U.S. Supreme Court held that the minority political party has shown "a reasonable probability that the compelled disclosure of a party's contributor names will subject them to threats, harassment, or reprisals from either government officials or private parties." 74 L. Ed. 2d at 257.

In ***NAACP v. Alabama*** [1958] 357 U.S. 449, 462, 78 S. Ct. 1163, 1171 L. Ed. 2d 1483, the Court stated that the "Court has recognized the vital relationship between freedom of association particularly where a group espouses dissident beliefs."

Significantly, other jurisdictions have found that compelling the disclosure of Church members and donors is unconstitutional. See ***Surinach v. Presquera de Busquets*** 604 F. 2d 73 [1st Ar. 1979; ***Church of Hakeem, Inc. v. Supreme Court***, 110 Cal. App. 384, 168 Cal. Rptr. 13 [1980].

In ***Britt v. Superior Court***, 20 Cal. 3d 844, 849-50, 153 Cal. Rptr. 695, 697 [1978], the California Supreme Court noted that "for more than two decades decisions of . . . the United States Supreme Court" had recognized "that compelled disclosure of private associational affiliations or activities will inevitably deter many individuals from exercising their constitutional right of association ..."

The Britt Court held that the compelled disclosure of Church membership records was unconstitutional, notwithstanding that the disclosure issue arose in the content of pretrial discovery in civil litigation.

In the present case, The Washington Courts have declined to grapple with the issues of freedom of association and have, instead, in past cases, issued cryptic and conclusory rulings upholding dismissal of plaintiffs' case. See ***Rhinehart v. Seattle Times***, 98 W 2d 226, 654 P 2d 673 [1982], Aff.d. 467 U.S. 20, 104 S. Ct. 2199, 812. Ed. 2d. 17[1984] and ***Rhinehart v. KIRO*** 44 W App. 707, 723 P 2d 22 [1986]. These cases in essence deny the threshold assumption that permeates the above-cited case law, that a serious and fundamental constitutional right is at issue. (These cases also relate to actions claiming money damages for loss of members and donors. Although this present action does not claim such damages, the State Court treated these cases as precedent for the present case. See Appendix I.) Contrary to the Washington State Court rulings, the right to associate for the advancement of beliefs is historically protected whether the belief sought to be advanced is religious, political or economic. ***Church of Hakeem*** 110 Cal. App. 3d 384, 168 Cal. Rptr. 13, (1980). Outside the religious context, when a secular organization is asked in pretrial discovery to divulge membership or associational ties, the courts have also found compelling disclosure violative of the First Amendment. ***Black Panther Party v. Smith***, 661 F2d 628 [5th Cir 1980]; ***Ealy v. Little John***, 569 F2d 219[5th Cir 1978]; ***Families Unidas v. Briscoe*** 544 F2d 182 [5th Cir 1976], ***Bursey v. United States***, 466 F2d 1059 [9th Cir 1972]; ***Britt v. Superior Court*** 20 Cal. 3d 844, 143 Cal. Rptr. 695 [1978].

In ***Eilers v. Palmer*** 575 F. Supp. 1259 Minn. [1984], an order compelling Plaintiff to answer interrogatories concerning the names of supporters of litigation by the religious group, Disciples of Lord Jesus Christ, was reversed. The Court concluded that compelling disclosure of the names of the groups supporters would create a genuine risk of interference with protected interests. 515 F. Sup. 1259 [1984] The Court reasoned that such disclosure would make groups in the future unwilling to accept support from unpopular groups once such an action may cause supporters of that religion to withhold support. Id at 1261 The Court concluded that due to the above reasons the information relating to supporting Plaintiffs lawsuit was privileged. The Court also indicated relevance.

In ***Eilers,*** the Court made its decision despite the Trial Court's granting a protective order. In the present case, the State Court

viewed a protective order as a cure-all, that obviates the need to recognize the Constitutional issue. The Washington State Court ignores the intrusion that would occur if members of the Aquarian Foundation were compelled disclosed. This intrusion would be the same as described in ***Eilers***. Regardless of the existence of a protective order, the chilling effect would be accomplished by drawing these members into the litigation.

As stated in the ***Hakeem*** case:

> [where motion for discovery of members to obtain source documents and compare the donation receipts with other records possessed by ministers] "In summary, real parties have not demonstrated a compelling state interest to obtain disclosure of Petitioner's nonlitigant rank and file members. The anonymity of that membership remains protected by their rights of associational privacy." 110 Cal. App. 3d at 389.

The few cases allowing for the associational privacy of individuals to be invaded are very narrow and specific, and relate to situations where the groups have publicly advocated violence or other unlawful goals. ***Familias Unidas,*** 619 F. 2d at 403. The significance of the acknowledged chilling effect in invading the privacy of persons associating according to their choice, is apparent in that the intent of such disclosure has historically been to deter the activities of such organizations. Id.

However, if a group has never publicly espoused an unlawful purpose, as The Aquarian Foundation has not, disclosure of members is repugnant to the constitution.

> "a number of complex motivations may impel an individual to align himself with a particular organization.
>
> . . . disclosure . . . need not be tolerated for those who had no reason to anticipate that their organization would engage in proscribed conduct." Id.

The Supreme Court should grant review of this significant issue of Constitutional Law. It has wide reaching impact, and there is a need for the court to address the divergent ways of treating this Constitutional issue among the several states.

II. THE STATE COURT VIOLATED PLAINTIFF'S FIRST AMENDMENT RIGHTS WHEN IT FAILED TO CONDUCT A BALANCING TEST OR TO REQUIRE DEFENDANTS TO DEMONSTRATE NEED OR PREJUDICE, AS TO RANK AND FILE MEMBERSHIP LISTS, AND VIDEOTAPES ORDERED IN DISCOVERY, AND DISMISSED PLAINTIFFS' CASE WHEN DISCOVERY WAS NOT PRODUCED.

The right to privacy in religious beliefs is personal to each individual and may not be waived by a group unless a compelling state interest is shown. Even if it is, The State Court in this case failed to identify a compelling state interest. Even if a compelling state interest exists, the least obtrusive means must be utilized to achieve that end.

Thomas v. Review Board of Indiana Employment, Security Div. 450 U.S. 707, 67 L. Ed. 2d 624 [1981]

> Since there is a presumption against restraints on the First Amendment freedoms, the specific means of regulating. . . those freedoms must be the least restrictive ones possible and needed to accomplish the compelling public purpose. . . The burden is on the government to demonstrate that the chosen means are the minimum restrictive ones necessary.

U.S. v. Silberman at 873, 464 F. Supp. 866, [M.P.FL. 1979]

It is well established doctrine that the least drastic means must be utilized by the state when "a governmental action [might] inhibit [sic] expression, belief or association." Note, ***Less Drastic Means and the First Amendment,*** 78 Yale L. 5.464, 1969 The Supreme Court stated:

> It is basic that no showing merely of rational relationship to some colorable state interest would suffice, in this highly sensitive constitutional order "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.

Sherbert v. Verner 374 U.S. at 406

The Washington State Courts, in fact, have adopted this Constitutional balancing test in ***Snedigar v. Hodderson*** 53 Wn.App. 476, 768 P.2d 1,(1989). Yet, the court refused to apply that test to this case, ruling that the previous ***Rhinehart*** cases had

deemed that discovery of membership lists did not violate Constitutional Rights (See Appendix 1.) This State Court ruling, therefore violates existing standards in Washington State, in addition to violating the historical standards recognized among state and Federal Courts alike.

If the State Court had bothered to apply a balancing test, it would have found that there was no attempt by defendants to obtain the same information by alternative methods, and that, more significantly, the membership lists sought were irrelevant. This is the prevailing result for similar cases in other jurisdictions.

In ***Hastings v. North East Independent School Dist.,*** 615 F.2d 628, 632 [5th Cir. 1980], the defendants' need for disclosure had "evaporated" when the plaintiffs dismissed their claim for monetary losses in order to preserve the anonymity of their membership lists. Similarly, in ***Familias Unidas v. Briscoe*** 544 F.2d 182, 192 [5th Cir. 1976], because the plaintiffs' amended complaint had dropped their prayer for monetary relief, the court noted that membership identity ceased to be a relevant issue in the lawsuit. In ***Church of Hakeem, Inc. v. Superior Court*** 110 Cal App.3d 384, 168 Cal. Rptr. 13 [1980], the court ruled that the litigants failed to demonstrate a strong enough state interest to compel disclosure of privileged rank and file membership lists.

Cases that do not involve a claim for monetary relief by the party invoking the privilege are applicable. For example, ***Bursey v. United States*** 466 F.2d 1059 [9th Cir. 1972], ***Ealy v. Littlejohn*** 569 F.2d 219 [5th Cir. 1978], and ***In re Rabbinical Seminary*** 450 F.Supp. 1078 [E.D.N.Y. 1978], each involved grand jury investigations initiated by the state.

In this case, ***KIRO*** initiated defamatory publicity aimed at destroying Appellants' religion. In suing on this defamation, Appellants need not expose rank and file members to loss of their private associational rights. Likewise, the privacy of First Amendment rights is affirmed in the context of legislative or executive investigations, ***Gibson v. Florida Legislative Investigation Comm.*** 372 U.S. 539 [1963]; ***Surinach v. Pesquera de Busquets*** 604 F.2d 73 [1st Cir. 1979], injunctive actions commenced by the state attorney general,

NAACP v. Alabama, supra public employee disclosure requirements, ***Shelton v. Tucker*** 364 U.S. 479 [1960], and election registration obligations, ***Brown v. Socialist Workers*** 103 S.Ct. 416, 74 L.Ed.2d 250 [1982]; ***Buckley v. Valeo*** 429 U.S. 1 [1976].

This lawsuit is in the nature of the cases where monetary relief is not demanded. In this case, the Aquarian Foundation has waived monetary damages for loss of members and donors.

The Supreme Court should review this matter, which has barred a minoritarian religion from the courthouse because defendants sought invasive and irrelevant data.

III. THE STATE COURT VIOLATED INDIVIDUAL PLAINTIFF'S RIGHTS TO DUE PROCESS WHEN IT DISMISSED HIS CASE FOR FAILING TO PRODUCE MEMBERSHIP LISTS AND VIDEO TAPES OVER WHICH HE HAD NO INDIVIDUAL CONTROL.

Reverend Rhinehart had no personal authority, nor a vote, (unless there was a tie), to release the membership and videotapes sought. [DCP 346].

This issue was glossed over by the State Court, when there is no authority to dismiss Reverend Rhinehart's case. Whatever is determined as to the Aquarian Foundation in this matter, it is well established that failure to comply with a discovery order is excused if the person so failing was legally unable to obtain the ordered document. To dismiss a case on these facts is a violation of due process. ***Societe Internationale Pour Partici-pations Industrielles et Commerciales, S.A., v. Rogers*** 357 US 197, 2 L. Ed 2d 2155, 78 S. Ct. 1087 [1958]

In this case, the State Court went beyond the record to conclude that Reverend Rhinehart was the "same" as The Aquarian Foundation, although the record clearly showed that in fact The Aquarian Foundation is an incorporated organization with a board of Directors.

This issue must be reviewed in order to safeguard the rights of individuals who need to litigate issues when some of the data is unavailable, and not under their control.

CONCLUSION

Aquarian Foundation and Reverend Rhinehart have presented three fundamental constitutional issues for the U.S. Supreme Court's review. These issues are raised after the Washington State Courts have consistently contradicted analogous authority from other jurisdictions. The State Courts have failed to offer reasoned analyses of why they have departed from the historical policy of holding First Amendment rights of freedom of association and religion to the strictest level of scrutiny. The State Courts have issued punitive orders depriving the litigants herein the right to pursue defamation claims in State Court. Accordingly, the Petitioners challenge the court to review this case, and ultimately to allow them to pursue a media broadcast that dubbed them atrocious murderers.

Dated

The Law Offices of Jean Schiedler-Brown
& Assoc., P.S.

Jean Schiedler-Brown
Attorney at Law

APPENDIX 1

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION ONE

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation; and LINDA DUNN, a married person	)
Appellants	) No. 22546-1-1
v.	) COMMISSIONER'S RULING GRANTING MOTIONS ON THE MERITS TO AFFIRM
KIRO, INC., a Washington corporation; THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS	)
Respondents	)

Keith Milton Rhinehart, Linda Dunn and the Aquarian Foundation (Rhinehart) appeal the trial court order dismissing their complaint against KIRO, Inc. and the Church of Jesus Chrisy off Latter Day Saints (KIRO) for failure to comply with discovery orders. KIRO has filed a motion on the merits to affirm pursuant to RAP 18.14. The commissioner heard argument. The motion is granted.

FACTS

Rhinehart is the leader of a Seattle-based spiritualist organization, the Aquarian Foundation. In 1984, KIRO produced and aired a three-part series on cults. Rhinehart has filed several complaints against KIRO based on the broadcasts. The complaint, like the others, is an action for defamation. Rhinehart's complaint was filed on February 28, 1986. KIRO served extensive interrogatories and requests for production on December 18, 1987. Among the materials requested were membership and donation records and three videotapes: one produced and aired on Japanese television in 1958; one aired in Washington on KTVW in 1962; and one recording a religious ceremony performed by Rhinehart at the Walla Walla penitentiary in 1978.

Rhinehart's responses to the discovery requests were incomplete. On March, 9, 1988, the parties entered a stipulated protective order. Rhinehart's subsequent responses were also incomplete. On May 5, 1988, the trial court granted KIRO's motion to compel discovery, requiring Rhinehart to provide, among other things, membership and donation records and the three videotapes. The trial court ruled that the tapes were relevant to the issue of truth and the membership and donation records were relevant to the issues of damages. Rhinehart advised the court that it would not provide this information on the grounds that disclosure violated the Foundation's rights to privacy, freedom of association and the priest-penitent privilege. Rhinehart also contended that he lacked the authority to produce membership records. On June 8, 1988, the trial court dismissed the action under CR 37.

Rhinehart's appeal raises three issues.

ISSUES

1. Did the trial court err in ordering Rhinehart to produce the Foundation's membership lists and donation records and the Walla Walla videotape?

2. Did the trial court err in disseminating Rhinehart's complaint for failure to comply with discovery orders?

3. Is KIRO entitled to an award of attorney fees for a frivolous appeal pursuant to RAP 18.9?

CRITERIA FOR DETERMINING WHETHER TO GRANT A MOTION ON THE MERITS TO AFFIRM

RAP 18.14(e)(1) provides:

> A motion on the merits to affirm will be granted in whole or in part if the appeal or any part thereof is determined to be clearly without merit. In making these determinations, the...commissioner will consider all relevant factors including whether the issues on review (a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly within the discretion of the trial court.

In applying these criteria in light of ***State v. Rolax***, 104 Wn.2nd 129, 702 P.2d 1185 (1985), the issues presented are clearly without merit.

DECISION

ISSUE 1 - Rhinehart contends that the trial court order requiring the Foundation to produce its membership lists and donation records violated the First Amendment rights of freedom of association and free exercise of religion. This argument was previously rejected in ***Rhinehart v. Seattle Times Co.***, 98 Wn.2d 226, 257, 654 P.2d 673 (1982), ***cert. denied***, 467 U.S. 1230, 81 L. Ed. 2d 884, 104 S. Ct. 2690 (1984); ***Rhinehart v. Seattle Times Co.***, 51 Wn. App. 561, 569-72, 754 P.2d 1243 ***review denied***, 111 Wn.2d 1025 (1988° and ***Rhinehart v. KIRO, Inc.***, 44 Wn. App. 707, 708, 723 P.2d 22 (1986), ***review denied***, 108 Wn.2d 1008 (1987).

Rhinehart contends, however, that those decisions are ill-reasoned and in conflict with the law of other jurisdictions and should be reversed. Once the Supreme Court has decided an issue of state law, it is binding on all lower courts until it is overruled by the Supreme Court. ***State v. Gore***, 101 Wn.2d 481, 487, 681 P.2d 227 (1984); accord, ***Hamilton v. Department of Labor & Indus.***, 111 Wn.2d 569, 571, 761 P.2d 618 (1988).

Rhinehart also contends that the membership and donation records are not relevant because, unlike the prior cases, he is not seeking special damages for lost members or donations.

A plaintiff in a defamation action must establish four essential elements: falsity, an unprivileged communication, fault and damages. ***Lamon v. Butler***, 112 Wn.2d 193, 197, 770 P.2d 1027 (1989); ***Herron v. King Broadcasting Co.***, 109 Wn.2d 514, 521-22, 746 P.2d 295 (1987); ***Mark v. Seattle Times***, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981), ***cert. denied***, 457 U.S. 1124, 73 L.Ed. 2d 1339, 102 S. Ct. 2942 (1982). When the plaintiff is a public official and the allegedly defamatory statement concerns the plaintiff's public duties, the plaintiff must show that the defendant acted with actual malice, ***i.e.*** with knowledge of its falsity. ***Herron***, at 522-23, (citing ***New York Times Co. v. Sullivan***, 376 U.S. 254, 11 L.Ed. 2d 686, 84 S. Ct. 710 95 A.L.R.2d 1412 (1964)).

In the complaint, Rhinehart alleged that KIRO's broadcasts held the Foundation and its members up to public ridicule and that as a direct result, members had suffered emotional distress and fear for their personal safety. Rhinehart also alleged that the broadcasts had prevented accomplishment of the Foundation's purposes and had directly caused financial losses. In responses to interrogatories, Rhinehart stated that the Foundation's purposes were prevented, among other things, "as a result of reduced or lost memberships,

reduced or lost gifts, donations, contributions, the drain upon existing finances..." The Foundation also stated, "The method used to calculate the damages is based on the loss of membership, reduced new members, and loss of income from contributions, donations, gifts, after the broadcasts were aired." It is clear from these allegations that membership lists and donation records are relevant to the issue of special damages.

During argument before the trial court, when it appeared that Rhinehart would be ordered to disclose the membership and donation records, Rhinehart attempted to abandon its claim for special damages and instead, sought only general damages. Rhinehart's claim for general damages was based upon the Foundation's loss of reputation. Rhinehart did not, however, move to amend its complaint or to dismiss its claims for special damages. It is unnecessary to determine whether Rhinehart's informal action was adequate to remove the issue of special damages because the membership and donation records are also relevant to Rhinehart's claim for general damages. KIRO was entitled to membership and donation records to demonstrate that the Foundation's reputation had not suffered as a result of the broadcast.

Rhinehart contends that the Walla Walla videotape is not relevant. Rhinehart contends that he agreed to stipulate to the date and time of the Walla Walla presentation, as well as the size of the audience and other information so that the actual tape was unnecessary to prove public figure status. Even if this stipulation were adequate as to the public figure issue, KIRO also sought the tape as relevant to the issue of the truth of KIRO's depiction of the Foundation. The tape is clearly relevant in this issue. The trial court did not err in ruling that the videotapes are relevant to he issue of Rhinehart's status as a public figure, as well as the truth of KIRO's broadcast. See ***Rhinehart v. Seattle Times***, 98 Wn.2d at 257.

Rhinehart also contends that the trial court failed to balance the Foundation's rights against KIRO's interest in defending the action. The parties entered a stipulated protective order that all documents and interrogatory responses produced would not be used for any purpose other than for this litigation. It has been previously held that similar protective orders were adequate to protect the Foundation against discovery abuse. ***Rhinehart v. Seattle Times,*** 98 Wn.2d at 257: ***Rhinehart v. Seattle Times,*** 51 Wn. App. at 571; ***Rhinehart v. KIRO, Inc.***, 44 Wn. App. at 709. There is no basis to distinguish this case from the prior cases on this issue.

Recently, in ***Snedigar v. Hodderson***, 53 Wn. App. 476, 483, 768 P.2d 1 (1989), the court adopted an analysis to be used in determining whether First Amendment privileges preclude or limit discovery,. First, the party asserting the privilege must make an initial showing that disclosure would impinge on First Amendment rights. If

this preliminary showing of privilege is made, the burden shifts to the party seeking discovery to establish the relevance and materiality of the information sought and to show that reasonable efforts to obtain the information by other means have been unsuccessful. If this burden is met, the trial by court then balances the parties' competing claims of privilege and need. The court may conduct an in camera inspection of the material. In ***Snedigar***, the court held that the party resisting discovery did not meet the threshold burden of establishing that the information was constitutionally privileged. The court, therefore, declined to reach the relevancy issue.

Although ***Snedigar*** was filed after the trial court decision in this case, the trial court followed essentially the same approach as that adopted in ***Snedigar***. Indeed, under ***Snedigar***, the second and third steps of relevancy evaluation and balancing would not be reached because prior cases have already determined that disclosure would not impinge on the Foundation's constitutional rights.

ISSUE 2 - Rhinehart contends that the trial court erred in dismissing the action for failure to comply with the discovery order. Rhinehart contends that the noncompliance was not willful and that KIRO was not prejudiced.

The trial court has broad discretion under CR 37 to impose sanctions for noncompliance with a discovery order and its decision will not be overturned absent a manifest abuse of discretion. ***Rhinehart v. KIRO***, 44 Wn. App. at 710; ***Associated Mortgage Investors v. G.P. Kent Constr. Co.***, 15 Wn. App. 223, 548 P.2d 558 (1976); ***See also Anderson v Mohundro***, 24 Wn. App. 569, 604 P.2d 181 (1979) (upholding dismissal of plaintiff's action because of willful and deliberate noncompliance with the trial court's discovery order). In the prior cases of ***Rhinehart v. Seattle Times***, 51 Wn. App. at 577 and ***Rhinehart v. KIRO***, Inc. 44 Wn. App. at 711, this court upheld dismissal of the complaints where the plaintiffs supplied vague or incomplete responses or failed to respond to interrogatories and requests for production following the issuance of orders compelling discovery subject to protective orders.

Although the discovery process in this case did not continue for the lengthy period of time as it did in the prior cases, the result was the same. Rhinehart's responses to the discovery requests were initially vague and incomplete. The trial court entered an order compelling discovery and informed Rhinehart that if the order was not complied with, sanctions would be imposed: "[e]ither terms, if appropriate, or it the nonresponse goes to a fundamental issue in the case and [Rhinehart] is taking the position that information will not be supplied then I would consider a dismissal of the complaint." Rhinehart failed to produce the required materials and stated that it would not do so. Rhinehart's violation of the discovery rules was willful and deliberate, i.e. was done without reasonable excuse.

Rhinehart v. Seattle Times, 51 Wn. App. at 577; ***accord, Snedigar v. Hodderson, supra*** at 487. KIRO was prejudiced in its ability to prepare its defense and no less drastic sanction would have sufficed. ***Rhinehart v. Seattle Times***, 51 Wn. App. at 577; ***Rhinehart v. KIRO, Inc.***, 44 Wn. App. at 711. The trial court did not abuse its discretion in dismissing Rhinehart's complaint.

Rhinehart also contends that dismissal of the complaint for failure to provide discovery was a violation of equal protection. This argument is vague and unsupported by citation of authority and it need not be considered. See In re Rosier, 105 Wn2d 606, 717 P.2d 1353 (1986).

Rhinehart also contends that it was a violation of due process to dismiss his claims and the claims of Reverend Linda Dunn because they did not have direct authority to obtain and produce the requested materials. This distinction between the Foundation and its leaders is contradicted by allegations in the complaint and responses to discovery. Furthermore, Rhinehart expressly forbade production of the documents and tapes.

ISSUES 3 - KIRO seeks the imposition of sanctions in the form of attorney fees and costs pursuant to RAP 18.9(a). RAP 18.9 authorizes this court to impose sanctions against a party who brings an appeal which is frivolous and brought for the purpose of delay. ***Miller Cascade Ins. Co. v. Briggs***, 100 Wn.2d 9, 15, 665 P.2d 887 (1983); ***Streater v. White***, 26 Wn. App. 430, 434, 613 P.2d 187 (1980). An appeal is frivolous when it presents no debatable issues and is so devoid of merit that there is no reasonable possibility to reversal. ***Streater v. White***, supra, at 434.

Although most of the issues in this case have been raised and rejected in at least two prior cases, Rhinehart's contention that this case is distinguishable from the prior cases on the basis that he is seeking different damages is debatable. The appeal is not frivolous. Now, therefore, it is hereby

ORDERED that the motion on the merits is granted and the decision of the trial court is affirmed; and, it is further

ORDERED that KIRO's request for attorney fees is denied.

Done this _____ day of June, 1989.

_____

Court Commissioner

APPENDIX 2

Honorable Sharon S. Armstrong
Civil Track I

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation; and LINDA DUNN, a married person,	)	
Plaintiffs,	)	NO. 86-2-03775-6 ORDER OF DISMISSAL
KIRO, INC., a Washington corporation, THE CHURCH OF JESUS CHRIST OF THE LATTER DAY SAINTS,	)	
Defendants.	)	

THIS MATTER comes before the Court upon the motion of defendants for an order dismissing the plaintiffs' complaint under Civil Rule 37 (b) (2) (C). The Court has reviewed the pleadings and records on file herein and has heard the arguments of counsel.

NOW, THEREFORE, this Court enters the following conclusions and order:

1. Plaintiff, Aquarian Foundation and Rhinehat have deliberately and willfully violated the May 5, 1988 order of this Court that they deliver to defendants, no later than noon on May 13, 1988, full and complete answers to Interrogatory Nos. 1, 6, 16, 18, 19, 21-28 and 30 and the documents described in Request Nos. 3, 5, and 6 of defendants' first interrogatories and requests for production, including membership and donor records, a videotapeof the Walla Walla morality presentation, and vidoetapes of broadcasts on KTVW Channel 13 and Japanese national television.

2. The Court placed plaintiffs on notice on May 5, 1988, that the consequence of failure to comply with the Court's order was dismissal of their complaint with prejudice.

3. Plaintiffs' violations of this Court's May 5, 1988 order were preceded by their violations of substantially identical orders entered in Rhinehart v. KIRO, Inc., King County Cause No. 81-2-16020-4; Rhinehard v. Seattle Times, King County Cause No. 80-2-01460-4; Rhinehart v. Seattle Times, King County Cause No. 82-2-17487-4; and The Aquarian Foundation v. Seattle Times, King County Cause No. 86-2-09172-6.

4. The materials that plaintiffs have refused to produce are relevant and material to the issues by plaintiffs' complaint for defamation.

5. Plaintiffs' refusal to produce the materials ordered by the Court has substantially prejudiced defendants' ability to prepare for trial.

6. Plaintiffs' violation of this Court's order unjustified and unexcused.

7. In view of the foregoing, all claims asserted and assertable in this action by the plaintiffs Aquarian Foundation and Rhinehart, against defendants shall be, and the same hereby are, dismissed with prejudice.

8. Defendants are entitled to an award of their reasonable attorneys' fees, in bringing this motion in the amount of $750.00. these sanctions are assessed jointly and severally against plaintiffs Keith Milton Rhinehart and The Aquarian Foundation.

ENTERED THIS 8th day of June, 1988.

_____

HON. SHARON S. ARMSTRONG

APPENDIX 3

IN THE COURT OF APPEALSOF THE STATE OF WASHINGTON DIVISION ONE

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation; and LINDA DUNN, a married person,	)	No. 22546-4-I
Appellants,	)	ORDER DENYING MOTION TO MODIFY, MOTION TO STRIKE AND IMPOSE SANCTIONS
v.	)	
KIRO, INC., a Washington corporation; THE CHURCH OF JESUS CHRIST OF THE LATTER DAY SAINTS,	)	
Respondents	)	

Appellants Keith Milton Rhinehart, Linda Dunn and The Aquarian Foundation filed a motion to modify the commissioner's ruling and a motion to strike an appendix to respondent's response filed herein. A panel of this court has considered the matters pursuant to RAP 17.7 and has determined that both motions should be denied. Respondents KIRO, Inc. and the Church of the Latter Day Saints filed a motion to impose sanctions upon appellants pursuant to RAP 18.7 and 18.9. A panel of this court has determined that the motion for sanctions should be granted. Now, therefore, it is hereby

ORDERED that the motion to modify is denied; and, it is further

ORDERED that the motion to strike the appendix to respondent's response is denied, and it is further

ORDERED that $2,500.00 sanctions are imposed against appellants.

DONE this 9th day of August, 1989.

_____

_____

_____

APPENDIX 4

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation; and LINDA DUNN, a married person,	)	No. 22546-4-I
	)	MANDATE
	)	NO. 22546-4-I
Appellants,	)	
	)	King County
v.	)	
	)	No. 86-2-03775-6
KIRO, INC., a Washington corporation; THE CHURCH OF JESUS CHRIST OF THE LATTER DAY SAINTS,	)	
Respondents	)	

The State of Washington to: The Superior Court of the State of Washington in and for King County.

This is to certify that the Court of Appeals of the State of Washington, Division I, considered and granted a motion on the merits in the above entitled case on June 13, 1989. A Motion to Modify was denied on August 9, 1989 and a Petition for Review denied on January 9, 1990. Accordingly, this cause is mandated to the Superior Court from which this appeal was taken for further proceedings in accordance with the determination of that court.

Pursuant to RAP 14.4 costs are taxed as follows: One Hundred Sixty-five and 90/100 ($165.90) dollars against appellants Keith Milton Rhinehart and The Aquarian Foundation and in favor of respondents KIRO, Inc. and The Church of Jesus Christ Of The Latter Day Saints.

cc. Ms. Jean Schiedler-Brown
Mr. Robert B. Mitchell
Mr. Stephen Smith

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 25th day on January, 1990.

RICHARD D. TAYLOR
Clerk of the Court of Appeals, State of Washington
Division I.

APPENDIX 5

AMENDMENT I—FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX 6

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

No. 90-118

IN THE

Supreme Court of the United States

October Term, 1990

KEITH MILTON RHINEHART
and
THE AQUARIAN FOUNDATION,
Appellants,

v.

KIRO, INC.
and
THE CHURCH OF JESUS CHRIST
OF LATTER DAY SAINTS,
Respondents.

On Petition For Writ of Certiorari
To The Court of Appeals
of The State of Washington

RESPONDENTS' BRIEF IN OPPOSITION

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August 3, 1990

BCD Legal Printers, Seattle, WA

RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Should this Court review petitioners' latest (*fifth*) attempt to persuade this Court that they are immune from civil discovery rules simply because they claim a religious affiliation?

2. May plaintiffs in an action seeking damages for defamation, and denying public figure status, despite entry of a stipulated protective order, deliberately withhold relevant evidence on damages, public figure status and/or truth issues?

3. Should this Court review the factual findings by the Washington courts that petitioners willfully disobeyed court orders compelling discovery?

RESTATEMENT OF PARTIES TO THE PROCEEDINGS BELOW

The parties before the trial court were as follows:

Plaintiffs: Keith Milton Rhinehart; The Aquarian Foundation; and Linda Dunn.

Defendants: KIRO, Inc.; and The Church of Jesus Christ of Latter Day Saints.

Petitioners in this proceeding are Keith Milton Rhinehart and The Aquarian Foundation.[1] Respondents are KIRO, Inc. and The Church of Jesus Christ of Latter Day Saints.

KIRO, Inc. is a Utah corporation. Its parent company is Bonneville International Corporation, also a Utah corporation. All subsidiaries of Bonneville International Corporation are wholly owned. The Church of Jesus Christ of Latter Day Saints is also known as the Mormon Church; it owns Bonneville International Corporation.

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[1] Petitioners' caption and the Statement of Parties to the Proceeding incorrectly identify Linda Dunn as an "appellant" or other party to this proceeding. Summary judgment was entered in the trial court against Ms. Dunn. She did not appeal that ruling and was thus not a party to the appeals in the Washington courts from which review is sought.

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IN THE

Supreme Court of the United States

October Term, 1990

KEITH MILTON RHINEHART
and
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v.

KIRO, INC.
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Respondents.

On Petition For Writ of Certiorari
To The Court of Appeals
of The State of Washington

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS AND JUDGMENTS OF THE COURTS BELOW

The trial court entered an Order Compelling Responses to Discovery Requests on May 5, 1988. CP 130-31.[2] An Order of Dismissal was entered by the trial court on June 8, 1988. CP 811-13; Petition, Appendix 2. The Washington Court of Appeals granted respondents' motion on the merits by a

[2] "CP" refers to the Clerks' Papers in the Washington State Court of Appeals. "SCP" refers to Supplemental Clerks' Papers in the Washington State Court of Appeals.

written order entered June 13, 1989. Petition, Appendix 1. The petitioners' motion to modify the ruling on the motion on the merits was denied by an Order Denying Motion to Modify, Motion to Strike and Impose Sanctions dated August 9, 1989. Petition, Appendix 3. The Washington Supreme Court denied the petitioners' Petition for Review on January 9, 1990. *Rhinehart, et al. v. KIRO, Inc.*, 113 Wn.2d 1035, 785 P.2d 825 (1990).

STATE LAW INVOLVED

The petition raises the question of the validity of Washington Superior Court Civil Rule 37(b)(2)(C) as applied to petitioners. Civil Rule 37(b) lists sanctions available against a party failing to comply with a court order compelling discovery. In pertinent part, Civil Rule 37(b)(2) provides as follows:

> If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> * * *
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or *dismissing the action* or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

[Emphasis added.]

RESTATEMENT OF THE CASE

A. Background and Prior Cases.

Petitioners Keith Milton Rhinehart ("Rhinehart") and his Seattle-based spiritualist organization, The Aquarian Foundation (the "Foundation"), are no strangers to litigation. This is the *fifth* case in which Rhinehart or the Foundation have asked *this* Court to review orders of dismissal for willful failure to comply with court-ordered discovery:

- *Rhinehart v. Seattle Times Co.*, __U.S.__, 467 U.S. 1230 (1984) (denying certiorari as to a similar order compelling discovery of one of the videotapes and membership data at issue in this petition);
- *Rhinehart v. Tribune Publishing Co., Inc.*, 484 U.S. 805 (1987) (dismissing appeal of action against KIRO, Inc. and others challenging orders compelling discovery of the same videotapes and membership/damages information at issue in this petition);
- *Aquarian Foundation v. Law Offices of Edwards & Barbieri*, 484 U.S. 892 *reh. denied*, 484 U.S. 1083 (1988); *on remand review denied*, 112 Wn.2d 1003, *cert. denied*, 110 S. Ct. 61 (1989) (dismissing appeal and denying certiorari in action dismissed upon failure to disclose Foundation members' addresses);
- *Rhinehart v. Seattle Times Co.*, 109 S. Ct. 1736 (1989) (dismissing appeal in action dismissed for failure to provide one of the videotapes and membership/damages data at issue in this petition).

All five cases involve the same pattern of discovery abuse by petitioners. The prior cases feature many of the same arguments on appeal, arguments this Court has determined four times are unworthy of review.

B. Allegations and Discovery Attempts in The Present Case.

The summons and complaint in this case were filed on February 28, 1986. CP 1. The complaint alleges that plaintiffs were defamed by news reports broadcast by KIRO-TV in early 1984 on the subject of cults.[3] CP 3-7. The complaint also alleges that Rhinehart is a *private* figure. CP 3. With respect to damages, the complaint alleges that the Foundation "depends upon financial support primarily from its membership," and that respondents' wrongful acts "have prevented the accomplishment of the Foundation purposes and have directly caused financial losses." CP 7.

KIRO served interrogatories and requests for production of documents upon Rhinehart and the Foundation on December 18, 1987. CP 15. Among the subjects addressed by the discovery requests were plaintiffs' damage claims, Rhinehart's status as a public figure, and certain unorthodox practices of the Foundation relevant to its description as a cult.[4] See CP 20-68. Rhinehart and the Foundation failed to answer, respond, or object, as required, within 20 days of service. CP 16.

---

[3] Contrary to the inaccurate description that appears in the petition at 7-8, the sole reference to petitioners in KIRO's broadcasts was a picture of the Foundation's Seattle headquarters that remained on the screen for four (4) seconds, preceded and followed by pictures of other Seattle-based cults. There was no audio broadcast concerning petitioners. SCP 7; see CP 253 (videotape of KIRO's broadcasts).

[4] *Webster's New Collegiate Dictionary* (1976) defines "cult" as "A religion regarded as unorthodox or spurious; also: its body of adherents." The Foundation is given to such unorthodox practices as seances, "bizarre performances," and apportation (*i.e.*, extracting "gems" from bodily orifices for sale to adherents). *See Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 227, 654 P.2d 673 (1982), *aff'd sub nom. Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984).

Following an exchange of letters, KIRO's attorney granted Rhinehart and the Foundation an extension of time to February 15, 1988, to answer and respond to KIRO's first discovery requests. CP 16-17, 70-73. Petitioners' responses, served February 15, 1988, were incomplete and evasive, and petitioners refused to produce documents unless a protective order was entered. CP 17, 74-75. Respondents then stipulated to a protective order proposed by *petitioners*, which the trial court entered on March 9, 1988. CP 17, 76-78; CP 13-14.

On March 9, 1988, petitioners produced summary financial statements for the Foundation for the years 1981-1985. Petitioners produced none of the other documents that KIRO had specifically requested. CP 17. When petitioners missed yet another deadline for production, KIRO brought a motion to compel discovery. CP 108-114.

C. The Order Compelling Discovery.

On May 5, 1988, the trial court entered an Order Compelling Responses to Discovery Requests (the "Discovery Order"). CP 130-131; see CP 188-219 (verbatim report of oral argument and the court's ruling). The Discovery Order required production of *three* videotapes and Foundation membership records no later than May 13, 1988. The Discovery Order cautioned that failure to comply would subject appellants to additional sanctions under Civil Rule 37, including dismissal. CP 131.

Rhinehart and the Foundation ignored the trial court's May 13 deadline. On May 19, 1988, respondents moved for dismissal under Civil Rule 37 and for summary judgment. CP 220-249; SCP 38-42.[5] Petitioners thereafter advised the

[5] Respondents sought summary judgment dismissing petitioners' defamation claims on several alternative grounds, including opinion, truth, lack of actual malice, and lack of damages. See SCP 10-24. Because of its disposition of petitioners' claims under Civil Rule 37, the trial court did not rule on respondents' motion for summary judgment against petitioners.

trial court that they would not provide either the membership information or the videotapes that they had been ordered to produce. CP 798-801. They also asserted, for the first time, that Rhinehart lacked authority to produce Foundation membership records. CP 805-806.

D. The Order of Dismissal.

On June 3, 1988, the trial court heard argument on respondents' summary judgment motion and motion to dismiss. On June 8, 1988 the court entered summary judgment dismissing the claims of plaintiff Linda Dunn. That judgment has not been appealed. The court also entered an order dismissing petitioners' claims under Civil Rule 37. CP 811-814. Petition, Appendix 2.

In its dismissal order, the trial court found that Rhinehart and the Foundation had deliberately and willfully violated the Discovery Order, that they had been placed on notice that the consequence of failure to comply was dismissal with prejudice, and that their violations of the Discovery Order were preceded by their violations of substantially identical orders in *four* other cases. The trial court also found that the materials petitioners had refused to produce were relevant and material to the issues of truth, public figure status, and damages; that petitioners' refusal to produce the materials had substantially prejudiced respondents' ability to prepare for trial; and that petitioners' violation of the Discovery Order was unjustified and unexcused. CP 812-813. Petition, Appendix 2.

E. Subsequent Proceedings on Appeal.

The Court of Appeals affirmed the trial court's order of dismissal. Petition, Appendices 1 and 3. Contrary to petitioners' claims in their petition (at 15-16 and 18), the Court of Appeals addressed specifically the "balancing" and "authority" issues. *See e.g.*, Appendix 1 at 23-25.

ARGUMENT

1. This Case Presents No Substantial Question Not Previously Decided by This Court.

Petitioners argue first that their membership lists should be protected from discovery under the First Amendment's guarantee of freedom of association. This argument was explicitly rejected in *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 257-258, 654 P.2d 673 (1982), *aff'd sub nom. Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). The court in that case held that a protective order adequately safeguarded the plaintiffs' interests in privacy and association, while still allowing defendants to develop their defenses. *Id.*, 98 Wn.2d at 258. This Court thereafter denied the petition for certiorari. 467 U.S. 1230 (1984). In the present case, petitioners cannot challenge the adequacy of the protective order that was entered, because *they* prepared it.

Petitioners also argue that their membership and donation records are irrelevant, since loss of members and donors is not at issue in this case. But petitioners' complaint seeks damages based on the allegation that members and donors were lost as a result of KIRO's broadcasts.[6] Petitioners' responses to KIRO's discovery requests elaborated on these damages as follows:

> The Aquarian Foundation suffered *loss of members and new memberships;* disruption of its activities; its members suffered from scorn, ridicule, threats of violence; actual violence; *loss of income from donations, contributions, loss of goodwill;* expenses for increased security of

[6] The petition (at 8 and 17) suggests that this claim was withdrawn. Petitioners' statement of the case is misleading at best. Petitioners never asked to or did amend their complaint against respondents. Their interrogatory responses describing those alleged damages (CP 64-65) were never supplemented, amended or withdrawn.

> Church and parsonage; increased legal expenses; increased telephone expenses . . .
>
> The method used to calculate the damages is based on the *loss of membership, reduced new members, and loss of income from contributions, donations, and gifts* . . .

CP 64-65 (answers and responses sworn to by Rhinehart on February 9, 1988) (emphasis added.)

It was not until oral argument on respondents' motion to compel that petitioners' counsel admitted petitioners had no proof to support their claim:

> [M]y clients have not identified any particular monetary losses, losses of donations or losses of members as a specific result of this broadcast.

CP 198. Petitioners then attempted to evade discovery of member and donor records. See CP 199-201. The trial court rejected this ploy:

> I do believe that [membership or donation information] is relevant to special damages which are claimed and to general damages, as well, and that information should be produced.

CP 212.

The trial court also ordered petitioners to produce *three* videotapes of public performances by Rhinehart: a videotape depicting ectoplasm production[7] first broadcast on Japanese national television; a broadcast (called "Way Out") shown on a Tacoma, Washington television station; and a videotape of Rhinehart's 1978 "morality presentation" to several hundred inmates at Walla Walla State Prison. The trial court ruled

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[7] *Webster's New Collegiate Dictionary* (1976) defines "ectoplasm" as "a substance held to produce spirit materialization and telekinesis."

that the videotapes were relevant not only to Rhinehart's status as a public figure, but also to the truth of KIRO's broadcast. CP 210-211. Specifically, the videotapes depict some of the unorthodox practices characteristic of a cult.

Petitioners' arguments about the videotapes are completely without merit. First, the petition ignores (at 9) two of the three videotapes that the trial court ordered produced. Second, petitioners fail to discuss at all the relevance of the tapes to the issue of unorthodox practices and the truth of the broadcasts. Petitioners then raise the same free exercise and "balancing" arguments that *this* Court declined to review on four prior occasions. *See* list of prior cases at p. 3, *infra.*

2. The Courts Below Balanced Petitioners' Interests and the Protective Order They Obtained with the Prejudice Created by Their Refusal to Permit Discovery.

Petitioners' claim that the Washington courts failed to "balance" their rights with the interests of petitioners (petition, at 15-17) is simply untrue. The text of the orders of the Washington courts demonstrates that such a balancing of rights and interests did indeed occur. CP 811-814. Petition, Appendix 1 (at 23-24) and Appendix 2 (at 27). Most important, any interests petitioners had in protecting against unwarranted disclosure of documents were addressed by the protective order proposed by *petitioners.* CP 17, 76-78.

As for prejudice, petitioners confuse the elements of their cause of action with the evidence KIRO needed to establish its defenses, such as truth, public figure status, and lack of damage. Petitioners simply stymied respondents' preparation of their case. In forcing respondents repeatedly to seek compliance with the discovery rules and then judicial relief, petitioners ran up the cost and prolonged the dangerous "chilling effect" of this litigation. *See Mark v. Seattle Times,* 96 Wn.2d 473, 484-485, 635 P.2d 1081 (1981), *cert denied,* 457

U.S. 1124 (1982). Dismissal was the only adequate and appropriate response to such conduct.

Petitioners' authorities provide no conflicts among jurisdictions or any unsettled issue of law under the considerations set forth in Supreme Court Rule 10. For example, petitioners placed in issue in this case their status as public figures, and damages arising from loss of reputation, membership and donors. CP 3-7. Thus, discovery relating to public figure status (*e.g.*, public broadcasts featuring petitioners) and to damages from loss of membership are not only relevant but critical to respondents' defenses.

Accordingly, this case is unlike the several cases cited in the petition in which the information sought (usually membership data) had no relevance whatsoever to the issues in those cases. *E.g., Black Panther Party v. Smith*, 661 F.2d 1243 (D.C. Cir. 1981); *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972); *Eilers v. Palmer*, 575 F. Supp. 1259 (D. Minn. 1984); *NAACP v. Alabama*, 357 U.S. 449 (1958); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Surinach v. Pesquera de Busquets*, 604 F.2d 73 (1st Cir. 1979); *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981); *United States v. Silberman*, 464 F. Supp. 866 (M.D. Fla. 1979).

By contrast, in other cases cited by petitioners the courts found that disclosure of otherwise protected data was appropriate if relevant to the issues of the case. *Rhinehart v. Seattle Times*, 98 Wn.2d 226, 654 P.2d 673 (1982), *aff'd sub nom., Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). *See also Hastings v. North End Independent School District*, 615 F.2d 628, 632 (5th Cir. 1980) (when disclosure of membership data is relevant to defense, trial court may compel disclosure).

Lastly, in cases in which a plaintiff has sought *no damages* at all, inquiry into lost membership may have no purpose. If

neither special damages for lost members or donors nor general damages for lost reputation are at issue, neither is the status of a plaintiff's membership. Accordingly, the decisions in *Church of Hakeem v. Superior Court*, 110 Cal. App. 3d 384 (Ct. App. 1980) and *Familias Unidas v. Briscoe*, 544 F.2d 182, 186 (5th Cir. 1976) are straightforward; there were *no* damage claims in those cases.

That is certainly not the case here. CP 7 (Complaint); CP 64-65 (Rhinehart interrogatory answers). Petitioners clearly placed in issue their general and special damages arising from lost membership, as well as petitioners' public figure status.[8]

3. The Courts Below Found That Rhinehart Had Authority to Permit Discovery, and He Expressly Forbade the Discovery at Issue.

Finally, petitioners argue (at 18) that Rhinehart's claims should not have been dismissed because he had no unilateral authority to compel discovery by the Foundation. This attempted distinction between the Foundation and its "ecclesiastical leader" runs counter to the allegations in the complaint and is belied by petitioners' discovery responses. See CP 3, 6; CP 47.

The argument is, in any event, completely disingenuous. There is no suggestion that Rhinehart requested or recommended that discovery be produced as required by the trial court. On the contrary, he expressly forbade it. CP 62-63; CP 223-224. The trial court and the Washington Court of Appeals so found. See Petition, Appendix 2 at 23 (¶ 1) and Appendix 1 at 25.

---

[8] The Washington courts have recognized that a party-plaintiff may not rely on a privilege to bar inquiry into a matter which plaintiff placed in issue. *Pappas v. Holloway*, 114 Wn.2d 198, 787 P.2d 30 (1990) (implied waiver of attorney-client privilege in attorney malpractice action).

Petitioners' reliance on *Societe Internationale Pour Participations Industrielles et Commerciales v. Rodgers*, 357 U.S. 197 (1958) is similarly disingenuous. The court in that case excused non-compliance with discovery because it occurred in good faith and under an honest belief that it may violate the laws of the foreign country under which that party was founded. Here, there is no finding of good faith by the petitioners. To the contrary, the courts below found the violations of discovery orders were deliberate and calculated.[9]

CONCLUSION

For the reasons stated above, respondents submit that this case presents no substantial question not previously decided by this Court. The petition should be denied.

Respectfully submitted this 3rd day of August, 1990.

Gordon G. Conger
Stephen A. Smith*
Robert B. Mitchell
PRESTON THORGRIMSON
SHIDLER GATES & ELLIS
**Counsel of Record for Respondents*

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[9] It is noteworthy that Rhinehart's claim in this case that he had no "authority" to disclose the requested information conflicts with his position in prior litigation. *Rhinehart v. KIRO*, 44 Wn. App. 707, 723 P.2d 22 (1986), *review denied*, 108 Wn.2d 1008, *appeal dismissed sub nom., Rhinehart v. Tribune Pub. Co.*, 108 S. Ct. 51 (1987) (Rhinehart offered to allow the inspection but not the copying of the videotapes at issue in this petition).